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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. [redacted] 43

THE DIXIE TERMINAL COMPANY,
Petitioner,

vs.

THE UNITED STATES.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS AND BRIEF IN SUPPORT THEREOF.

ROBERT A. TAFT,
Attorney for Petitioner.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 961

THE DIXIE TERMINAL COMPANY,
Petitioner,

vs.

THE UNITED STATES.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

Your petitioner, The Dixie Terminal Company, prays that a writ of certiorari be issued to the Court of Claims of the United States to review the judgment of that court in the above entitled action, and respectfully shows to this Honorable Court:

Judgment Below.

Judgment of the Court of Claims was entered on November 9, 1936. Motion for a new trial was filed January 8, 1937, and was overruled on February 8, 1937.

Statement of the Case.

Suit was instituted in the Court of Claims by the petitioner, an Ohio corporation, as the owner, holder for value,

and bearer of a Fourth Liberty Loan 4¼% Gold Bond in the principal amount of $50.00, to recover $1.07, either in gold coin or legal-tender currency, on the interest coupon due October 15, 1934, attached to such bond. The bond of the petitioner bore the serial number A00055321, and was by its terms redeemable at the pleasure of the United States on or after October 15, 1933, at par and accrued interest, on any interest date or dates. By the express terms of the bond, the principal and interest thereof were payable in United States gold coin of the standard of value as of the date of issue. On October 12, 1933, the Secretary of the Treasury, by Department Circular 501, purported to issue a notice of call for redemption on April 15, 1934, of that part of the Fourth Liberty Loan issue in which the final digit serial numbers were 9, 0 or 1, thus including the petitioner's bond.

On March 11, 1935, petitioner duly presented its bond to the respondent, and demanded payment in gold dollars of the standard of value of the date of issuance, but the respondent refused to redeem the bond except by the payment of $50.00 in legal-tender currency. The offer of the Government was refused by the petitioner, who thereafter on the same day presented the interest coupon due October 15, 1934, attached to said bond, and demanded payment of the amount thereof, $1.07, either in gold coin or legal-tender currency. The respondent refused payment on the ground that the bond had been called for redemption on April 15, 1934. Upon such refusal by the respondent to pay the October 15, 1934, interest coupon, the petitioner filed suit on March 11, 1935, in the Court of Claims to recover in legal-tender currency (not in gold coin) the amount of such interest coupon.

Question Presented.

Whether interest ceases to run on a bond of the United States, payable in gold coin of the standard of value in ef-

fect October 24, 1918, when the Secretary of the Treasury on October 12, 1933, issues a purported call for redemption on April 15, 1934, but refuses to pay the bond except in legal-tender currency.

Reasons for the Allowance of the Writ.

1. *The Court of Claims decided the question involved in this case in a way which does not give proper effect to the decision of this Court in the case of Perry* v. *United States,* 294 U. S. 330.

In that case this Court held unconstitutional the Joint Resolution of June 5, 1933, which attempted to provide that obligations of the United States, payable in gold coin, might be discharged by the payment of currency. It is true that the Court held that the bondholder failed to prove any damages from failure to pay gold—in short, that the remedy sought was defective for an unquestioned legal right. In this case the bondholder does not seek payment in gold, but insists upon his right to receive interest on his bond until its maturity, unless the Government complies with its legal obligation to pay gold.

2. *The decision of the Court of Claims is squarely in conflict with the decision of the Fourth Circuit Court of Appeals in a case involving the same issue with respect to an interest coupon on a First Liberty Loan Bond; Machen* v. *United States,* 87 F. (2d) 594.

In this case Judge Parker, writing the opinion for the Court of Appeals, rejects the reasoning and conclusions of the Court of Claims. He says:

> "The argument of the government and the decision of the Court of Claims in *Dixie Terminal Co.* v. *United States,* — Ct. Cl. —, to which our attention is called proceed upon the theory that the provision of the bond

providing for notice, upon which interest is to cease and coupons subsequently maturing are to become void, is to be construed as though it were independent of the provision for redemption which it follows, i.e. that a notice is sufficient which states that the bonds will be redeemed on the named date, even though it does not say or mean to say that they will be redeemed in accordance with their terms. We think that the position is unsound and that, under the decision in the *Morgan case, supra,* the provision as to notice must be construed as a part of the provision for redemption."

3. *The question raised by this case is of great public and general interest.*

After the passage of the Joint Resolution of June 5, 1933, and before and after the decision of this Court in the *Perry* case, the Secretary of the Treasury has attempted to call all gold-clause bonds which could be called in advance of their maturity, amounting to more than eight billion dollars. The list includes:

Fourth Liberty Loan Bonds called for April 15, 1934	$1,875,000,000
Fourth Liberty Loan Bonds called for October 15, 1934	1,250,000,000
Fourth Liberty Loan Bonds called for April 15, 1935	1,870,000,000
Fourth Liberty Loan Bonds called for October 15, 1935	1,250,000,000
First Liberty Loan Bonds called for June 15, 1935	1,929,915,000
2% Consols of 1930 called for July 1, 1935	599,724,000
2% Panama Canal Bonds called for August 1, 1935	74,901,000
Total	$8,849,540,000

Other such gold-clause bonds are outstanding, not callable at this time, but callable in the future, an attempt to

call which may be made. The question involves directly the credit of the United States and the sanctity of its contracts. It involves a construction of various statutes of the United States relating to the calling of bonds which have never been construed. The question raised herein has never been passed upon by this Court; its character demands that it should be.

Conclusion.

For the reasons herein set forth, it is respectfully submitted that this petition should be granted.

ROBERT A. TAFT,
Attorney for Petitioner.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

Opinion Below.

One opinion was delivered by the Court of Claims. It was written by Judge Littleton and filed November 9, 1936. It appears at page 14 of the Record, and is reported in 83 Ct. Cls. 656. No opinion was delivered by the Court in denying the motion for a new trial.

Jurisdiction.

The jurisdiction of this Court is invoked under Section 3 of the Act of February 13, 1925, c. 229 (43 Stat. 939, 28 U. S. C. A. § 288).

The judgment of the Court of Claims was entered on November 9, 1936, a motion for a new trial was filed January 8, 1937, and was overruled on February 8, 1937 (R. 18). The petition herein was filed on May 7, 1937.

Chronological Statement of Documents, Statutes, Proclamations and Circulars Involved.

Petitioner is the owner and holder for value of a United States Fourth Liberty Loan Bond reading as follows:

"$50 $50 A00055321*.

Fourth Liberty Loan.

4¼% Gold Bond of 1933-1938.

The United States of America for value received promises to pay to the bearer the sum of Fifty Dollars on October 15, 1938, and to pay interest on said principal sum at the rate of four and one-quarter per cent per annum from the date hereof on April 15 and October 15 in each year until the principal hereof shall be payable upon presentation and surrender of the interest coupons as they severally mature, at the Treasury De-

partment, Washington, or at the holder's option, at any agency or agencies in the United States which the Secretary of the Treasury may from time to time designate for the purpose. The principal and interest hereof are payable in United States gold coin of the present standard of value. This bond is one of a series of four and one-quarter per cent gold bonds of 1933-1938 authorized by an Act of Congress approved September 24, 1917, as amended and issued pursuant to Treasury Department Circular No. 121, dated September 28, 1918, to which reference is hereby made for a statement of the further rights of the holders of bonds of said series as fully and with the same effect as if herein set forth. All or any of the bonds of said series may be redeemed at the pleasure of the United States, on and after October 15, 1933, at par and accrued interest as in said circular provided. This bond does not bear the circulation privilege.

Washington, October 24, 1918.

Recorded: J. O.

W. G. McAdoo,
Secretary of the Treasury.

Houston B. Teehee,
Register of the Treasury.

Act approved September 24, 1917, as amended."

(Eight coupons, April 15, 1935, to October 15, 1938, attached.)

The interest coupon attached to petitioner's bond, payable October 15, 1934, reads as follows:

"The United States of America

will pay to bearer on October 15, 1934, at the Treasury Department, Washington, or at a designated agency, $1.07, being six months' interest then due on $50 Fourth Liberty Loan 4¼% Gold Bonds of 1933-1938 unless called for previous redemption.

A00055321*. (32.)

Houston B. Teehee,
Register of the Treasury."

The relevant portion of Treasury Department Circular 121, under which petitioner's bond was issued, reads:

> "TREASURY DEPARTMENT,
> Office of the Secretary,
> Washington, September 28, 1918.
>
> The Secretary of the Treasury invites subscriptions, at par and accrued interest, from the people of the United States for $6,000,000,000 of United States of America Four and One-Quarter Per Cent Gold Bonds of 1933-1938 * * *. The bonds will mature October 15, 1938, but the issue may be redeemed at the pleasure of the United States on and after October 15, 1933, in whole or in part, at par and accrued interest, on any interest day or days, on six months' notice given in such manner as the Secretary of the Treasury shall prescribe. In case of partial redemption the bonds to be redeemed will be determined by such method as may be prescribed by the Secretary of the Treasury. From the date of redemption designated in any such notice, interest on bonds called for redemption shall cease. The principal *and interest of the bonds* are payable in United States gold coin of the present standard of value."

Fourth Liberty Loan Bonds were issued under the Act of September 24, 1917 (40 Stat. at L. 288, c. 56, U. S. C., Title 31, § 752) as amended by the Act of April 4, 1918 (40 Stat. at L. 502, c. 44, § 1) and the Act of July 9, 1918 (40 Stat. at L. 844, c. 142, § 1), the pertinent provisions of which read as follows:

> "The Secretary of the Treasury, with the approval of the President, is authorized to borrow, from time to time, on the credit of the United States * * * not exceeding in the aggregate $20,000,000,000, and to issue therefor bonds of the United States * * *."
>
> "The bonds herein authorized shall be in such form or forms and denomination or denominations and subject to such terms and conditions of issue, conversion,

redemption, maturities, payment, and rate or rates of interest, not exceeding 4¼ per centum per annum, and time or times of payment of interest, as the Secretary of the Treasury from time to time at or before the issue thereof may prescribe. The principal and interest thereof shall be payable in United States gold coin of the present standard of value."

At the time of passage of the Act of September 24, 1917, and its amending statutes, and at the time the Fourth Liberty Loan Bonds were issued, there was in effect the Act of March 14, 1900 (31 Stat. at L. 45, c. 41, § 1), defining the gold content of the dollar, and reading as follows:

> "The dollar consisting of twenty-five and eight-tenths grains of gold nine-tenths fine shall be the standard unit of value, and all forms of money issued or coined by the United States shall be maintained at a parity of value with this standard, and it shall be the duty of the Secretary of the Treasury to maintain such parity."

Under the authority of the Emergency Banking Act passed on March 9, 1933, the President on April 5, 1933, issued Executive Order No. 6102, prohibiting the hoarding of gold, and requiring all persons to deliver all gold coin, gold bullion, and gold certificates owned or acquired by them to the Government, and accept legal-tender currency therefor.

On May 12, 1933, Congress passed, and the President approved, the Agricultural Adjustment Act of May 12, 1933, authorizing the President, among other things, to reduce the gold content of the dollar.

On June 5, 1933, the Congress of the United States adopted a Joint Resolution (48 Stat. at L. 113, c. 48, U. S. C., Title 31, § 463), which reads as follows:

> "Provision for payment of obligations in gold prohibited; uniformity in value of coins and currencies.

(a) Every provision contained in or made with respect to any obligation which purports to give the obligee a right to require payment in gold or a particular kind of coin or currency, or in an amount in money of the United States measured thereby, is declared to be against public policy; and no such provision shall be contained in or made with respect to any obligation hereafter incurred. Every obligation, heretofore or hereafter incurred, whether or not any such provision is contained therein or made with respect thereto, shall be discharged upon payment, dollar for dollar, in any coin or currency which at the time of payment is legal tender for public and private debts. Any such provision contained in any law authorizing obligations to be issued by or under authority of the United States, is hereby repealed, but the repeal of any such provision shall not invalidate any other provision or authority contained in such law.

(b) As used in this section, the term 'obligation' means an obligation (including every obligation of and to the United States, excepting currency), payable in money of the United States; and the term 'coin or currency' means coin or currency of the United States, including Federal Reserve notes and circulating notes of Federal Reserve Banks and national banking associations."

On August 28, 1933, the President promulgated Executive Order No. 6260, requiring every person owning gold coin, gold bullion, or gold certificates to make a return to the Secretary of the Treasury, and prohibiting the acquisition of any such gold without license and the holding of any such gold without license after thirty days from the date of the order, under penalty of fine and imprisonment.

On October 12, 1933, the Secretary of the Treasury issued Treasury Department Circular No. 501, purporting to call the petitioner's bond for redemption, the pertinent part of which reads as follows:

"TREASURY DEPARTMENT,
Office of the Secretary,
Washington, October 12, 1933.

To Holders of Fourth Liberty Loan 4¼ per cent Bonds of 1933-38, and Others Concerned:

1. NOTICE OF CALL FOR PARTIAL REDEMPTION OF FOURTH LIBERTY LOAN 4¼ PER CENT BONDS OF 1933-38 (FOURTH 4¼'s) BEFORE MATURITY.

1. Pursuant to the provision for redemption contained in the bonds and in Treasury Department Circular No. 121, dated September 28, 1918, under which the bonds were originally issued, all outstanding Fourth Liberty Loan 4¼'s, bearing the serial numbers which have been determined by lot in the manner prescribed by the Secretary of the Treasury, are called for redemption on April 15, 1934, as follows:

All outstanding permanent coupon bonds bearing serial numbers the final digit of which is 9, 0, or 1, such serial numbers being prefixed by a corresponding distinguishing letter J, K, or A, respectively;
All outstanding temporary coupon bonds bearing serial numbers the final digit of which is 9, 0, or 1; and
All outstanding registered bonds bearing serial numbers the final digit of which is 9, 0, or 1.

2. Interest on all such outstanding Fourth 4¼'s so called for redemption will cease on said redemption date, April 15, 1934."

On January 30, 1934, the Gold Reserve Act of 1934 (Act of January 30, 1934, 48 Stat. at L. 340, c. 6) became law. Section 5 of such Act reads:

"No gold shall hereafter be coined, and no gold coin shall hereafter be paid out or delivered by the United States: Provided, however, That coinage may continue to be executed by the mints of the United States for foreign countries in accordance with the Act of January 29, 1874 (U. S. C., Title 31, Sec. 367). All gold

coin of the United States shall be withdrawn from circulation, and, together with all other gold owned by the United States, shall be formed into bars of such weights and degrees of fineness as the Secretary of the Treasury may direct."

On January 31, 1934, the President issued a Proclamation (48 Stat. at L. 1734), the relevant provisions of which are:

> "Now, therefore, be it known that I, Franklin D. Roosevelt, President of the United States, by virtue of the authority vested in me by section 43, title III of said act of May 12, 1933, as amended, and by virtue of all other authority vested in me, do hereby proclaim, order, direct, declare, and fix the weight of the gold dollar to be 15-5/21 grains nine tenths fine, from and after the date and hour of this proclamation. The weight of the silver dollar is not altered or affected in any manner by reason of this proclamation."

Petitioner's bond was not presented for payment on April 15, 1934, but after the decision of this Court in the *Perry* case on February 18, 1935, it was presented for payment on March 11, 1935, and payment demanded in gold coin in accordance with its terms. The respondent refused to pay gold on the ground that the Treasury was forbidden to pay out gold; and refused to redeem the bond except in legal-tender currency. Thereupon petitioner presented the interest coupon due October 15, 1934, on which this suit is brought, and demanded payment either in gold coin or in legal-tender currency. Payment was refused on the ground that interest had ceased to run on April 15, 1934.

On August 27, 1935, Congress adopted a Joint Resolution withdrawing the consent of the United States to the assertion against it of any right, privilege or power "upon any gold-clause securities of the United States, or for interest thereon". Since this action was taken after the deci-

sion of this Court that the Government's obligation to pay gold was valid, this Joint Resolution is clearly a reaffirmation of the Government's refusal to pay gold, and of its intention to redeem the called bonds in currency only. However, the Resolution expressly provides that the section shall not apply "to any proceeding referred to in this section in which no claim is made for payment or credit in an amount in excess of the face or nominal value in dollars of the securities, coins or currencies of the United States involved in such proceeding". Since this and similar suits only claim the face or nominal value in dollars of the coupon sued upon, the Resolution does not apply in any way to this kind of a suit.

ARGUMENT.

Summary.

1. THE PROVISIONS OF THE BOND AND CIRCULAR WITH RESPECT TO PAYMENT IN GOLD COIN ARE VALID UNDER THE PERRY DECISION, AND NOT BY THE LEGISLATION ADOPTED BY CONGRESS.

2. THE PURPORTED CALL ON OCTOBER 12, 1933, WAS VOID, BECAUSE IT WAS A CALL FOR PAYMENT IN CURRENCY, AND NOT IN ACCORD WITH THE TERMS OF THE BOND.

3. REGARDLESS OF THE VALIDITY OF THE PURPORTED CALL, THE RUNNING OF INTEREST ON PETITIONER'S BOND DID NOT CEASE ON APRIL 15, 1934, BECAUSE THE UNITED STATES WAS NOT READY AND WILLING AT THAT TIME, OR AT ANY TIME, TO REDEEM ITS BOND IN ACCORDANCE WITH ITS TERMS.

4. THE PURPORTED CALL ISSUED ON OCTOBER 12, 1933, WAS VOID, BECAUSE THE SECRETARY OF THE TREASURY HAD NO AUTHORITY TO ISSUE A CALL WITHOUT FURTHER ACTION BY CONGRESS.

5. THE PURPORTED CALL ISSUED ON OCTOBER 12, 1933, WAS VOID BECAUSE FORBIDDEN BY SECTION 731 OF TITLE 31 OF THE UNITED STATES CODE (ACT OF MARCH 18, 1869, 16 STAT. 1).

1. The provisions of the bond and circular with respect to payment in gold coin are valid under the Perry decision, in spite of the legislation adopted by Congress.

In the case of *Perry* v. *United States*, 294 U. S. 330, this Court held that the Joint Resolution of June 5, 1933, in so far as it attempted to override the obligation to pay in gold coin created by the Fourth Liberty Loan Bonds, went beyond the congressional power. Chief Justice Hughes, delivering the opinion of the Court, said:

> "The Constitution gives to the Congress the power to borrow money on the credit of the United States, an unqualified power, a power *vital to the Government*—upon which in an extremity its very life may depend. The *binding quality* of the promise of the United States is of the essence of the credit which is so pledged. Having this power *to authorize the issue of* definite obligations for the payment of money borrowed, the Congress has not been vested with authority to alter or destroy these obligations. The fact that the United States may not be sued without its consent is a matter of procedure which does not affect the legal and binding character of its contracts. While the Congress is under no duty to provide remedies through the courts, the contractual obligation still exists and despite infirmities of procedure, remains binding upon the conscience of the sovereign."

In view of this decision, there can be no doubt that the Government was obligated to pay the petitioner's bond in gold coin of the former standard of value. The lack of remedy and failure of proof found to exist in the *Perry* case is not material here, because the petitioner is not suing for gold, and is not seeking damages for failure to pay gold, but is merely claiming the right to interest until maturity, or until the bond is called and paid in accordance with the admitted obligation of the Government. Although the Government is legally and morally obligated to pay this bond

in gold, it is now trying to redeem the bond, and to pay that bond immediately in a depreciated currency. If the Government had to pay the bond in gold, it would never have called the bond. It is only because it desires to take advantage of its repudiation, and because of the difficulty of the bondholder securing any remedy against that repudiation, that the effort is made to pay in advance of maturity. It may be that at maturity, if the Government maintains its position, and no further change is made in the monetary policy or the value of gold, the petitioner will have to accept currency in payment of the bond, but in the meantime we submit that it may collect interest in legal-tender currency, unless the Government is willing to redeem the bond in accordance with its terms.

2. The purported call on October 12, 1933, was void, because it was a call for payment in currency, and not in accord with the terms of the bond.

The purported call for redemption issued by the Secretary of the Treasury on October 12, 1933, did not state in what medium the bonds would be redeemed or paid on April 15, 1934. The Court of Claims apparently rested its decision on its belief that a notice of call was actually issued, and stated that "It is agreed that a notice of call was issued and a date fixed for redemption prior to the period for which plaintiff is now demanding interest". We respectfully submit that it is not agreed that a notice of call was issued. Our position is that under the law existing on October 12, 1933, Congress and the President had clearly provided that all persons, including the United States, might pay their obligations in currency. Under the authority of the Emergency Banking Act, the President had issued executive orders making it illegal to hoard gold, and requiring every holder of gold to deliver such gold to the Government. Under the Agricultural Adjustment

Act, the President had been authorized to change the value of the gold dollar. Prior to October, 1933, the Government had entered upon a gold-purchasing program, by which the price of gold had been daily increased. Certainly it would have been illegal for the Secretary of the Treasury to pay out gold in redemption of Government Bonds. If it was illegal for the Secretary of the Treasury to pay out gold, it was certainly illegal for him to call the bonds for payment in gold. The Secretary of the Treasury, of course, was entirely subject to the will of Congress. If he had any authority to call bonds in gold at all, it existed under the statutes of Congress, and could not exist at all in the face of the Emergency Banking Act and the Agricultural Adjustment Act. The call, therefore, can only be construed as a call for payment in currency.

The Government was obliged to pay the bonds in gold under the holding of this Court in the *Perry* case. A call for payment in currency was just as void as a call for payment of the bond by paying fifty per cent of its face amount, or a notice of redemption in real estate or corporate stocks or silver bullion. This call must certainly be interpreted in the light of the existing statutes, and so interpreted it was a direct notice from the Government that it desired and intended to redeem the bonds in legal-tender currency, and not in accordance with their terms.

This is no imaginary argument. When the call was issued, everybody in the United States knew exactly what was intended. Congress had repeatedly declared its intention of abandoning gold and paying in currency. No official of the Government, no holder of any bond, had the slightest idea that the notice of call meant anything except a call to pay in currency. In fact, the Secretary of the Treasury would never have called the bonds if he had the slightest expectation of having to pay in gold.

Our position is supported by the decision of the Circuit Court of Appeals for the Fourth Circuit in the case of *Machen* v. *United States of America*, 87 F. (2d) 594 at p. 597. Judge Parker said:

> "It would hardly be contended that a notice to the effect that the government would redeem the bonds at 59 cents on the dollar would be a sufficient notice under the bond to stop the running of interest and avoid the subsequently maturing coupons; but it will be seen that this is precisely what the notice as published means when the acts of Congress and the presidential proclamation affecting the currency are read into it, and when it is remembered that Congress is without power to abrogate the gold clause as contained in obligations of the Government. • • •
>
> It follows that, because of the legislation and the presidential proclamation to which we have referred, the Secretary of the Treasury was without power, both at the time of the publication of the notice and at the time fixed for redemption, either to pay gold on the gold clause bonds or to pay in paper money the value of the gold which they promised. He was consequently without power under the law to redeem these gold clause bonds at their face value; and the notice of redemption which he issued must be construed in the light of this lack of power."

3. Regardless of the validity of the purported call, the running of interest on petitioner's bond did not cease on April 15, 1934, because the United States was not ready and willing at that time, or at any time, to redeem its bond in accordance with its terms.

The Government relies on that sentence in the Circular of September 28, 1918, which states that "From the date of redemption designated in any such notice, interest on bonds called for redemption shall cease". But surely this does not mean that interest shall cease on the mere issue of

a call, without intention or ability to redeem the bonds on the call date. Analyzing the situation, it would appear that interest on called bonds ceases (1) if proper notice of redemption is given, and (2) if on presentation the bond is paid in accordance with its terms, or would be so paid if presented. It can hardly be contended that the call itself is the only condition upon which interest ceases. If a corporation calls bonds, and then fails to have the money on hand to redeem the bonds in accordance with the call, the holder of such bonds surely has the option of retaining his bonds until maturity and collecting interest. It is possible that he also has the option of availing himself of the terms of the call, and suing for immediate payment, on the ground that the debtor has estopped itself from denying the validity of the call.

The necessary and logical conclusion from the Government's position is that under the terms of the bond the Government could call a bond without the slightest intention of paying it, and thereby cause interest to stop running. In the *Perry* case, this Court insisted on the sacredness of the Government's obligations. The construction of the obligation insisted on by the Government would enable it to cancel its sacred obligations.

In the case of *Sterling* v. *H. F. Watson Company*, 241 Pa. 105, 88 Atl. 297 (1913), the defendant attempted to call its preferred stock by the payment of its par value and accrued dividends, which it was entitled to do, but attempted to deduct from the accrued dividends the par value of a twenty-five per cent stock dividend which had been distributed eight years before. The stockholder sued to restrain the company from stopping dividends after the call date, and from refusing to transfer the stockholder's stock. The Supreme Court of Pennsylvania held that the twenty-five per cent stock dividend could not be considered under the terms of the preferred stock redemption clause,

and granted the stockholder's petition, requiring the company to treat the plaintiff as a stock-holder by transferring his stock, and to continue the payment of semi-annual dividends until a call was issued strictly in accordance with the terms of the redemption clause.

In *Corbett, Executrix,* v. *McClintic-Marshall Corporation,* 17 Delaware Chancery 165 (1930), the directors of the company exercised their charter right to redeem complainant's preferred stock, but complainant contended that the price at which they proposed to redeem was not the correct price. On demurrer, the Chancellor held that the petition stated a proper cause of action, but that the complainant was not entitled to insist on cash redemption at the higher price which she claimed, because this was within the discretion of the board of directors, a discretion which they had not exercised. The Court held, however, that she was entitled, if she proved her case, to retain the status of a preferred stockholder. The Court said, on page 171:

> "In view of the fact that the bill shows that the defendant has notified the complainant in substance that she is to be denied the status of a preferred stockholder in the future, the nature of the case, if the complainant be right in her claims touching the alleged illegality of the proposed redemption, requires a decree that although she cannot on the facts alleged enforce a redemption in accordance with her specific prayers, yet the defendant is bound to treat her as a preferred stockholder until proper redemption of her stock has been effected."

It is well settled that holders of bonds without a call provision cannot be made to accept payment in advance of maturity; *Chicago, etc., Railroad Co.* v. *Pyne,* 30 Fed. 86; *Missouri Railroad Co.* v. *Union Trust Co.,* 156 N. Y. 592, 51 N. E. 309. A statute providing that payment must be accepted before maturity is unconstitutional; *Randolph* v.

Middleton, 26 N. J. Equity 543. Surely an effective call cannot be issued unless it is followed by a tender of the money either to a trustee or paying agent in the case of a private corporation, or direct to the bondholder in the case of the United States. As the Court of Appeals of New York said, in the case of *Missouri Railroad Co.* v. *Union Trust Company:*

> "They (the bondholders) have the right to have their bonds redeemed only according to the contract, and unless they are so redeemed, to hold them and draw interest upon them until the day of payment shall arrive."

We respectfully call the Court's attention to the English case of *Gordillo* v. *Weguelin*, 5 Chancery Division 287 (1877), in which the question of cessation of interest was discussed. In that case a mortgage indenture provided that the debtor would pay interest and five per cent of the principal sum semi-annually. Provision was made that a certain amount of bonds should be drawn for redemption on May first and November first of each year, to be redeemable on the following June first and December first, respectively. The indenture then provided: "but no interest shall be payable on any drawn bond after the date fixed for its redemption." The debtor having defaulted, the trustees took possession after certain bonds had been drawn and called, but before they had been redeemed. The question arose whether the holders of bonds drawn for redemption, but whose bonds the trustee was unable to pay, were entitled equally with holders of undrawn bonds to receive interest. The court held, despite the words quoted above, that interest continued to accrue on the drawn bonds, because they had not been paid on the date fixed for redemption, and that such interest had the same status under the terms of a deed of trust as interest on the undrawn bonds. Lord Justice James said:

"I am of opinion that upon the whole deed what was intended was that interest should run until the bond was paid, or until it was payable according to the terms of the deed, that is de facto payable out of funds provided for that purpose. When the bonds were in truth payable, not payable in the sense of the money being recoverable in an action at law, or anything of that kind, but payable by reason of the fund being provided for the purpose of paying them, either in the hands of the contractors or received by the trustees, then the interest would cease, and until it was so payable in truth and in fact, as well as in legal right of action, the interest runs."

The Court of Claims relies on the promise in the bond to pay interest "until the principal hereof shall be payable", and states that the word "payable" does not mean "paid". We submit that the phrase "until the principal becomes payable" is a stock phrase employed by generations of bond draftsmen, and means simply that the bond will bear interest until maturity. We call the Court's attention to the opinion of this Court in the case of *Morgan* v. *United States*, 113 U. S. 476, in which the Court quoted from earlier decisions in which a distinction was made between the words "redeemable" and "payable", and in which it was pointed out that bonds do not become payable until the maturity date, although they may under their terms be redeemable prior to such date. Of course any court would hold that after actual redemption in accordance with the terms of the bond, or tender of such redemption, interest would cease. But we do not agree that on April 15, 1934, the bond became payable under the circumstances existing in this case; it simply became redeemable.

The truth is that when the bond was drafted no one contemplated the possibility of repudiation by the United States, and no provision was made in the bond to cover

such a contingency. As stated by Mr. Justice Strong in *United States* v. *Sherman*, 98 U. S. 565 at pp. 567-568:

> "Delay or default cannot be attributed to the government. It is presumed to be always ready to pay what it owes."

As is pointed out in 50 *Harvard Law Review*, 986, the interpretation of the Circuit Court of Appeals in the *Machen* case seems more in accord with the intent of the parties. The Liberty Bonds drafted by officials of the Government must be construed most strongly against it. No one purchasing a Liberty Bond considered the possibility of the United States repudiating its obligations.

4. The purported call issued on October 12, 1933, was void, because the Secretary of the Treasury had no authority to issue a call without further action by Congress.

As pointed out on pages 8-9, the Fourth Liberty Loan Act authorized the Secretary of the Treasury to prescribe the terms of redemption of bonds issued under such Act. Under such broad authority, the Secretary of the Treasury might have prescribed any one of several methods for issuing a notice of call. He actually did prescribe that the Fourth Liberty Loan Bonds should be redeemable at the pleasure of the United States. In the case of *Morgan* v. *United States*, 113 U. S. 476, Mr. Justice Matthews, writing the opinion for this Court, referred to the provision as to calling bonds there involved, and stated:

> "The pleasure of the Government to redeem them or any part of them, of course, could only be declared by law. Provision to this effect was made by the Act of July 14, 1870."

We respectfully submit that the conclusion of this Court in that case was correct. There is no more reason why the pleasure of the Secretary of the Treasury should be the

pleasure of the United States than the pleasure of the President, or of the Vice-President, or any other officer of the Government. The redemption of bonds is a major financial transaction, requiring the consideration of Congress. The Secretary of the Treasury Department, between October 12, 1933, and August 1, 1935, determined to call nearly nine billion dollars in bonds payable in gold, at a time when the terms of the bonds could not be complied with. The policy followed involved a repudiation by the Government of its solemn obligations declared to be such by this Court in the case of *Perry* v. *United States*, 294 U. S. 330. Certainly no one would maintain that an individual, holding an appointed office in a government founded on the theory of popular representation and control, would have the right to obligate the country for nine billion dollars. We submit that he has no greater right to exercise the pleasure of the United States in repudiating obligations incurred on the authorization of Congress.

5. The purported call issued on October 12, 1933, was void because forbidden by Section 731 of Title 31 of the United States Code (Act of March 18, 1869, 16 Stat. 1).

Section 731 of Title 31 of the United States Code was passed originally in 1869, and incorporated into the Revised Statutes as Section 3693. It provides:

> "None of the interest-bearing obligations not already due shall be redeemed or paid before maturity, unless at such time United States notes are convertible into coin at the option of the holder, or unless at such time bonds of the United States bearing a lower rate of interest than the bonds to be redeemed can be sold at par in coin."

The reason for this passage of this law was obviously to prevent the Government from doing just what it is attempting to do now—paying off its obligations to its bondholders in a

depreciated currency. United States notes, or "greenbacks", were, of course, at a considerable discount from gold in 1869, and were not redeemable in gold or silver coin at that time. In order to protect the bondholders, Congress provided that none of the interest-bearing obligations should be redeemed or paid before maturity as long as United States notes were not convertible into coin at the option of the holder. Never on March 1, 1933, nor at any subsequent date have United States notes been convertible into coin at the option of the holder. The Government, and not the holder, has the option, and it may pay out currency of any kind for any United States notes presented.

The proviso at the end of Section 731 was intended to permit the redemption of bonds if the Government is in a position to sell its bonds and receive gold for them, even though they bear a lower rate of interest. If the bonds bearing a lower rate of interest can only be sold for currency, then no call can be made. It is obvious that Government Bonds, when this call was issued in 1933, could not be sold for gold coin. There was no gold coin except in minor hoards, and if anyone could lawfully have obtained gold, he would not have paid gold for United States Bonds, whether on their face they were payable in gold or in currency. It is suggested that United States Bonds might have been sold for silver coin. Obviously the Government has never sold bonds and required payment in silver coin, and it is not a practical operation. There is not enough silver coin in the country to pay for an issue as large as the Fourth Liberty Loan issue called. The silver coin not in the Treasury is required for ordinary change throughout the country. Furthermore, the silver coin has a purely fictitious value in excess of the value of the silver contained in such coins, and in effect is nothing but subsidiary currency. In 1869 it might have been possible for the Government to sell gold bonds and require payment in gold coin, thus obtaining the gold coin

necessary to redeem the prior issue, but since the validity of the gold clause is in doubt, such bonds cannot be sold today.

We respectfully submit that Section 731 was intended to prevent exactly what the Government is now trying to do.

Conclusion.

We submit that the decision of the Court of Claims denies "the validity of the public debt of the United States, authorized by law," and makes a mockery of the power of Congress "to borrow money on the credit of the United States."

Respectfully submitted,

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